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NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIFTH APPELLATE DISTRICT

THE PEOPLE, Plaintiff and Respondent, v. DEVON CAMDEN MONDINE, Defendant and Appellant.	F069986 (Super. Ct. Nos. BF146307A, BF127849A & BF136825B) **OPINION**

APPEAL from a judgment of the Superior Court of Kern County. Michael E. Dellostritto, Judge.

Charles M. Bonneau, Jr., under appointment by the Court of Appeal, for Defendant and Appellant.

Kamala D. Harris, Attorney General, Michael P. Farrell, Assistant Attorney General, Catherine Chatman and A. Kay Lauterbach, Deputy Attorneys General, for Plaintiff and Respondent.

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INTRODUCTION

This is an appeal of three cases. In Kern County Superior Court case number BF146307A, appellant Devon Camden Mondine was convicted of murder (Pen. Code,

§ 187, subd. (a);[1] count 1); attempted murder (§§ 664/187, subd. (a); count 2); and possession of a firearm as a felon (§ 29800, subd. (a)(1); count 3). For counts 1 and 2, the jury found true that appellant acted with premeditation and deliberation (§ 189); and he personally discharged a firearm (§ 12022.53, subd. (d)). For all three counts, the jury found true that the crimes were committed for the benefit of, at the direction of, or in association with a criminal street gang with the specific intent to promote, further or assist in criminal conduct by gang members (§ 186.22, subd. (b)(1)). Appellant received an aggregated indeterminate sentence of 90 years to life.

Appellant was sentenced in two additional Kern County Superior Court cases, BF127849A and BF136825B (the Companion Cases). He received 16 months for violating Health and Safety Code section 11378, and two years for violating former Penal Code section 12021, subdivision (a)(1).

On appeal, appellant contends the evidence is insufficient to support the murder and attempted murder verdicts; the trial court erred in prohibiting certain defense expert testimony; insufficient evidence exists to sustain the gang enhancements; the trial court erred in permitting certain expert testimony for the prosecution; prosecutorial misconduct occurred during closing arguments; and sentencing error occurred regarding the Companion Cases. Respondent also raises an issue, contending sentencing error occurred because appellant did not receive any additional time in counts 1 and 2 for the gang enhancements.

We determine the evidence is insufficient to sustain the gang enhancements in counts 1, 2 and 3. We also agree with appellant that sentencing error occurred in the Companion Cases. We reject the parties' remaining arguments and otherwise affirm, but we remand for resentencing.

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[1] All future statutory references are to the Penal Code unless otherwise noted.

FACTUAL BACKGROUND

I. The Prosecution's case in BF146307A.

A. The shooting.

Appellant was a member of the West Side Crips, a criminal street gang in Bakersfield, California. On January 20, 2013, he shot Otis Taylor and Clint Alexander, who were both members of the same gang with appellant. Taylor died from five gunshot wounds. Alexander lived but suffered a gunshot wound to his left knee, which required two surgeries.

The shooting occurred outside the home where Taylor resided. Earlier in the day, appellant had been riding in a vehicle with other acquaintances and friends, including his girlfriend, Lynley Edwards. They arrived at Taylor's residence around 4:00 or 5:00 p.m. Davontae Woodberry, known as Man-Man, and his brother, were some of the passengers with appellant. Misty Fuentes drove the vehicle. Upon arriving at Taylor's residence, Fuentes parked at the bottom of the driveway. Woodberry and another male exited the vehicle. Woodberry went inside Taylor's residence and then across the street to a store. Appellant remained in the car with other people, including Edwards. Edwards told the jury she thought appellant was being "set up" because the group "took forever" while driving, and they would not drop appellant and Edwards off elsewhere.

Appellant's demeanor that afternoon was described as normal and "all right." He did not appear upset or drunk. Edwards, however, later told police she believed appellant was "bipolar" and he would act "crazy" after drinking one beer. She told the jury that although appellant appeared normal he was "high" that afternoon after he had smoked "weed" and had consumed a beer.

Just prior to the shooting, Taylor and Alexander came outside from the residence. Appellant exited the vehicle and talked with them on the driveway. Both Taylor and Alexander kept their hands in their pockets. According to Edwards, who watched from the vehicle, appellant had an argument with them. Edwards told the jury she believed

Taylor and Alexander were armed because they kept their hands in their pockets. Taylor and Alexander turned and walked away from appellant, who shot them as they walked away. Appellant then approached the victims and fired more shots, aiming the gun down at them.

Appellant was driven away from the scene in the same vehicle, which stopped and picked up Edwards, who had fled across the street. Appellant and Edwards were dropped off at a nearby donut shop approximately two miles away. After getting out, appellant threw his gun into nearby bushes.

Law enforcement located nine shell casings at the shooting scene. Neither victim had a weapon in their possession. An officer located appellant in the vicinity of the donut shop, and another officer located appellant's .40-caliber handgun in the bushes.

Edwards testified that appellant obtained his gun the night before this shooting. She observed appellant and his friends "beat up a Mexican guy" and take his gun.

The parties stipulated that appellant had previously been convicted of a felony offense as required in count 3 of the information.

B. Appellant's interview with law enforcement.

A detective interviewed appellant three or four hours after the shooting. The interview was recorded, and the video was played for the jury.

Appellant told the detective he had been paranoid and suspicious. He said his intended target had been "Little No Brains," who was causing him to lose sleep. Appellant started carrying a gun with him at all times because he thought someone was trying to get him. Riding around in the vehicle before the shooting, he became suspicious that he was being "set up" because his companions would not take him home or to a park as he asked. While driving, Man-Man had told him to put a bullet into his gun's barrel, telling appellant to stay ready. This made appellant very suspicious.

The week before, appellant had picked up "one dude" out of town and, by the time they returned to town, appellant had felt that this male, apparently Little No Brains, was

talking about something "sneaky." Appellant thought people wanted to catch him "slippin'" and he felt suspicious of "talk" he had heard. The night before, appellant had received a telephone call at about 2:30 a.m., apparently from Little No Brains, and appellant thought it sounded "evil" and like "somebody should get knocked off." Appellant did not know if it was real or fake.

Appellant believed Little No Brains was a "shot caller" in the gang or somebody who could make stuff happen. Appellant described him as somebody who had "respect." He expressed concern that Little No Brains was after him. According to appellant, it was him "against the world." Appellant had received calls from different people saying "he" was looking for appellant, which scared him. That is why, on the drive before the shooting, appellant kept asking the others to take him home. He did not feel comfortable or safe.

Appellant said he did not know what was happening when they stopped at Taylor's residence. Two males, one of whom was Man-Man, ran across the street, which appellant thought was suspicious. The victims walked out of the house. Appellant knew they and the "other guy" were all from the "same hood." The victims walked towards the vehicle and appellant got out. They ignored him when he asked if they were armed, just keeping their hands in their pockets. Appellant assumed the victims had a weapon, or they were going to get one. Appellant told the detective there were "bad vibes." The victims walked off together, but one of them started to go in a different direction. They kept their hands in their pockets as they walked away. Appellant said he reacted because the victims kept their hands in their hoodies. He did not know why the victims started to walk away, and he had been telling his companions to "take me home." Appellant had been losing sleep and had been scared. He fired at the victims and walked towards them. He shot until he emptied his clip.

Appellant said the shooting "had to do with one person." Apparently referring to Little No Brains, appellant said they had "got into a little" in a grocery store parking lot

after appellant gave him his "stuff" back. Little No Brains had said he should "sock" appellant for leaving. Appellant told the detective that his feelings could have been wrong about the situation, but he shot the two victims after he saw one of them walking around the car. He did not think his bullets were working because he did not see them strike the victims. The victims dropped and he did not know how they ended up close together. He went closer to the victims and shot down at them until the gun was clicking. He believed he shot at both victims equally.

Appellant did not know the driver, Fuentes. After the shooting, he told her to go. He pushed her and told her to drive off because he wanted to get away from Taylor's house. At a light near the donut shop, Fuentes told him to get out, and he did, jumping out of the car with his girlfriend. Appellant tossed his gun because he no longer needed it and police were everywhere.

Appellant denied he was manipulated into doing the shooting, saying it was "all my actions." He said he had smoked some "weed" on the afternoon of the shooting, drank two beers and "probably sipped off a couple other people's beers and that's it." He had snorted some "coke" two days before the shooting. He said he could remember everything.

Appellant told the detectives that his nickname was supposed to be "Baby No Brains." Appellant had wanted to give back his name "and be through with it." Little No Brains had wanted appellant to be his "little homey." Appellant told the detectives that the shooting was not gang related and he did not "want none of it."

C. Appellant's statements in jail.

While in jail, appellant had a telephone conversation with Edwards, which was recorded and played for the jury. Appellant asked Edwards if the "Westside Niggas" were mad.

Edwards visited appellant at jail. Their conversation was recorded and played for the jury. Appellant said he had felt "funny" in the car and "that weed was fire." Edwards commented that she saw he was high and "fuckin' out of it."

D. Gang evidence.

Joshua Escobedo, a police officer with the Bakersfield police department, testified as the prosecution's gang expert. Escobedo had worked as a gang investigator in the gang unit for a little over a year and a half. Prior to that, he had worked as a patrol officer. He had personal experience in dealing with the West Side Crips in Bakersfield. He explained to the jury this gang's traditional boundaries, its rivalries and alliances, its traditional color and hand signs, and its hierarchy.

Escobedo explained how gang monikers, such as Big No Brains, Lil No Brains, Baby No Brains and Tiny No Brains, are used. The "big homey" would bring a new member into the gang, and the new member would take a similar nickname out of respect. If No Brains was the senior member, the newer member might be called Lil No Brains. Lil No Brains might bring somebody new into the gang, calling that person Tiny. A "big homey" has more power within the gang, and newer members would have to show that person allegiance. It was very important for a gang member to maintain respect in the gang. Escobedo had seen people killed over a lack of respect.

Escobedo reviewed and explained for the jury two prior predicate crimes which had been committed by other West Side Crips gang members. He discussed the gang's primary activities, which included murders, shootings, assault with firearms, carjackings, and narcotic sales. Committing a murder was the fastest way a gang member could elevate status. Regarding a West Side Crips member shooting another member, Escobedo said it was very rare, but it did occur.

Escobedo opined that appellant, Taylor and Alexander were all West Side Crips gang members on the day of this shooting. He believed the present crime was committed for the benefit of or in association with the gang because a "big disagreement" had

occurred between these gang members. Appellant believed the victims were retrieving a firearm and he shot his fellow "homey or gang member." Escobedo opined that Deondrae Miller was known as "Lil No Brains" and he was a West Side Crips gang member on the day of this shooting.

The prosecutor posed the following hypothetical question to Escobedo:

> "[PROSECUTOR]: Officer, I would like you to assume the circumstances of the following hypothetical as true. You have an active member of the West Side Crips who you call Shooter [*sic*] has had a falling out with his big homey, and that's made Shooter a little scared. One day Shooter is out with acquaintances and he encounters a couple of other people who also end up being active West Side Crips gang members, and we will call them Victim 1 and Victim [2].
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> "After a brief conversation with Victim 1 and Victim 2, Shooter draws his weapon, fires it at each of them until his gun runs dry, and he kills Victim 1 and wounds Victim 2, [*sic*] do you have an opinion as to whether the crimes as they are described in that hypothetical were completed for the benefit or in the furtherance of or in association and do you have such an opinion, and what do you base it on?
>
> "[ESCOBEDO]: Yes. My answer for that particular scenario would be for the benefit of and furtherance of and in association of, and it's kind of multiple part."

Escobedo explained that "Shooter" had a "falling out with his big homey or the guy who brought him into the gang in particular." The shooting benefited him because he avoided being perceived as "soft" among other gang members, which would cause him to lose status within the gang. To maintain his status, Shooter used violence, which also benefited the gang as it demonstrated to the public the level of brutality the gang members were willing to use. This violence would also keep rival gang members from invading their territory. Finally, this crime demonstrated "association" because multiple people within the gang were trying to resolve a common gang problem.

On cross-examination, Escobedo opined that Shooter had a problem with his big homey, and with Victims 1 and 2. They were associating together as part of the gang and an "in-house altercation" occurred.

II. Defense case.

Gary A. Longwidth, a clinical psychologist, testified for the defense. In preparation for his trial testimony, Longwidth reviewed two mental health reports regarding appellant, a restoration of competency report, and he interviewed appellant. Longwidth agreed with prior diagnoses that appellant suffered from attention deficit disorder, bipolar disorder, and had a potential substance abuse disorder. Longwidth learned that appellant began using marijuana in eighth grade, began drinking alcohol in the 10th grade, and began using PCP when he was approximately 15 years old. When appellant was 20 years old, he was struck on his head during a fight and rendered unconscious. Longwidth diagnosed a provisional mild traumatic brain injury. Subsequently, appellant began to experience an "overwhelming sense of paranoia" which stemmed from his drug abuse, the history of bipolar, and the head injury.

As of the date of this crime, Longwidth opined that appellant suffered from bipolar disorder, attention deficit disorder, he had a previous traumatic brain injury, and he had drug abuse. As a hypothetical, Longwidth was asked how such a person would react if he felt threatened. Longwidth opined that such a person "would do whatever is necessary to eliminate the threat." The person would have confused, disorganized and irrational thoughts. The person would make "decisions based on information that's not real, but very real to them."

On cross-examination, Longwidth admitted that appellant exhibited goal oriented behavior regarding some of his actions, such as running away and discarding the gun. Longwidth agreed appellant could have goal oriented thoughts.

III. Rebuttal evidence.

Edwin Peng, a psychiatrist, testified for the prosecution. Peng had treated appellant at Patton State Hospital and he had examined appellant about a year prior to his trial testimony. Peng had diagnosed appellant with depression, post-traumatic stress disorder, and polysubstance abuse. At that time, appellant was not exhibiting symptoms of bipolar disorder. In preparing for his trial testimony, Peng reviewed a report written by Longwidth regarding appellant. Peng had read that Longwidth had diagnosed appellant with bipolar disorder, attention deficit disorder, and a mild traumatic brain injury complicated by drug toxicity. Peng opined that a person with appellant's disorders, past brain injury, and illegal drug use could still engage in goal oriented behavior.

DISCUSSION

I. Sufficient Evidence Establishes Premeditation And Deliberation.

Appellant contends the record contains insufficient evidence to support the findings of premeditation and deliberation in counts 1 and 2. He argues these convictions must be reduced to voluntary manslaughter and attempted voluntary manslaughter based on his "actual but unreasonable belief in the necessity for self-defense."

A. Standard of review.

For an appeal challenging the sufficiency of evidence, we review the entire record in the light most favorable to the judgment to determine whether a reasonable jury could have found the defendant guilty beyond a reasonable doubt based on " 'evidence that is reasonable, credible, and of solid value ….' " (*People v. Jones* (2013) 57 Cal.4th 899, 960.) In doing this review, we are not required to ask whether we believe the trial evidence established guilt beyond a reasonable doubt. (*People v. Johnson* (1980) 26 Cal.3d 557, 576.) Rather, the issue is whether any rational jury could have found the essential elements of the crime beyond a reasonable doubt after viewing the evidence favorably for the prosecution. (*Ibid*.) We are to presume the existence of any fact the

jury could have reasonably deduced from the evidence in support of the judgment. (*People v. Clark* (2011) 52 Cal.4th 856, 943.)

B. Analysis.

Appellant asserts he "delusionally believed" Taylor and Alexander "were in cahoots" with Little No Brains, and they posed a threat of imminent harm. He rejects any notion he had a motive to kill, and he questions the validity of the prosecution's gang expert who opined the shootings were motivated to benefit the gang. He concedes he armed himself in advance, but contends he did so to defend himself generally. He argues the "shootings were spontaneous and disorganized." He maintains this record does not show premeditation and deliberation. We disagree.

Premeditation and deliberation exist when a killing or attempted killing occurred as a result of preexisting reflection rather than an unconsidered or rash impulse. (*People v. Bolin* (1998) 18 Cal.4th 297, 332.) In the context of first degree murder, " 'premeditated' means 'considered beforehand,' and 'deliberate' means 'formed or arrived at or determined upon as a result of careful thought and weighing of considerations for and against the proposed course of action.' [Citations.]" (*People v. Mayfield* (1997) 14 Cal.4th 668, 767, overruled on other grounds in *People v. Scott* (2015) 61 Cal.4th 363, 390, fn. 2.)

The Supreme Court utilizes three categories of evidence to resolve the issue of premeditation and deliberation: planning activity, motive, and manner of killing. (*People v. Steele* (2002) 27 Cal.4th 1230, 1249.) These factors do not require a "special combination" and they are not accorded any particular weight, but they are a guide to assess whether the evidence supports an inference a killing or attempted killing occurred because of preexisting reflection. (*People v. Bolin*, *supra*, 18 Cal.4th at pp. 331–332.) The appellate court will uphold a finding of premeditation and deliberation when there is (1) extremely strong evidence of planning, or (2) evidence of motive coupled with either (a) evidence of planning or (b) evidence of a manner of killing showing that the

defendant must have had a preconceived design. (*People v. Bloyd* (1987) 43 Cal.3d 333, 348.)

While premeditation and deliberation do not require an extended period of time, the test is not the duration of time so much as the extent of reflection. (*People v. Bloyd, supra,* 43 Cal.3d at p. 348.) The Supreme Court has cautioned, however, that if "deliberation" and "premeditation" meant no more reflection than that involved in forming intent to kill, then there would be no distinction between murder, and premeditated and deliberate murder. (*People v. Anderson* (1968) 70 Cal.2d 15, 26.)

Here, the victims walked out of Taylor's residence and appellant said they came towards the vehicle. He exited the vehicle to speak with them while carrying a loaded gun. This is circumstantial evidence appellant considered the possibility of a violent encounter. (*People v. Lee* (2011) 51 Cal.4th 620, 636.)

The victims ignored appellant when he asked if they were armed. He was suspicious because Taylor and Alexander kept their hands in their pockets. He became alarmed when they turned and walked away from him while keeping their hands in their pockets. He believed they were either armed, or they were possibly going to retrieve weapons. Although the record does not suggest a significant period of time passed before appellant began to fire, premeditation and deliberation do not require an extended period of time, and cold, calculated judgment can occur quickly. (*People v. Bolin, supra,* 18 Cal.4th at pp. 331–332.) Because appellant opened fire after speaking with the victims, and after they began to walk away, a rational jury could have reasonably determined appellant acted on more than just a rash impulse.

After initially firing, appellant walked towards the victims and fired more shots while pointing his gun downward. He fired a total of nine times, emptying his clip. The manner of Taylor's killing and Alexander's attempted killing shows calculation and a preconceived design.

The jury was given the opportunity to find appellant guilty of voluntary manslaughter (heat of passion) and attempted voluntary manslaughter. In rendering its verdicts, the jury rejected these alternative theories. Based on this record, the jury could have reasonably determined appellant acted with more than a sudden heat of passion.

When the Supreme Court's three factors are analyzed, substantial evidence supports an inference of appellant's preexisting reflection. This evidence was reasonable, credible, and of solid value such that a rational jury could have found beyond a reasonable doubt that appellant acted with deliberation and premeditation regarding both victims. Accordingly, appellant's convictions in counts 1 and 2 are affirmed.[2]

II. The Trial Court Did Not Abuse Its Discretion When Limiting Longwidth's Testimony.

Appellant argues the trial court erred when it sustained a prosecution objection, and ordered stricken, some of the defense expert's testimony.

A. Background.

1. Longwidth's testimony.

During Longwidth's direct examination, defense counsel posed a hypothetical question based on the evidence previously presented. Longwidth was asked to assume a person suffers from bipolar disorder, attention deficit disorder, had a previous traumatic brain injury, consumed alcoholic beverages, smoked marijuana and injected cocaine about 24 hours prior to the incident. With those mental illnesses and that combination of drugs and alcohol, Longwidth was asked how such a person would "behave in a situation where they felt threatened?" Longwidth stated such a subject would respond irrationally. He interjected that "[i]n this case," appellant had believed someone was trying to kill

[2] Because substantial evidence supports the finding of premeditation and deliberation, we will not address appellant's additional arguments that his convictions should be reduced to voluntary manslaughter and attempted voluntary manslaughter, respectively.

him, and, "[t]herefore, in his belief system in order to eliminate that threat, he has to kill them."

The prosecutor lodged an objection, which the trial court sustained. Longwidth's last answer was struck and the jury was instructed to disregard it. Defense counsel then asked Longwidth to "not talk about this case. Let's talk about their behavior tendencies as well as the illnesses that we talked about, how would they react?" Longwidth answered, "They would do whatever is necessary to eliminate the threat." He noted that such a subject would be confused, disorganized and irrational in thinking. The person would make "decisions based on information that's not real, but very real to them."

2. Relevant jury instructions.

Pursuant to CALCRIM Nos. 571 and 604, the jurors were instructed on the imperfect self-defense doctrine regarding the shooting of both victims. The jurors were told to find appellant not guilty of any crime if they concluded he acted in complete self-defense. The distinction between complete self-defense and imperfect self-defense depended on whether appellant held a reasonable belief deadly force was necessary. Imperfect self-defense was present if appellant believed he was in imminent danger of being killed or suffering great bodily injury, and he believed the immediate use of deadly force was necessary to defend against the danger. However, one of those beliefs must have been unreasonable. The prosecution had the burden of proving beyond a reasonable doubt that appellant did not act in imperfect self-defense.

3. Closing arguments.

The prosecutor opened his closing arguments by telling the jury it was obvious appellant had shot the victims, and the real issue was his intent. He argued how and why the facts established premeditation and deliberation regarding the murder and attempted murder. He explained why the jury should find true the gang enhancements. The prosecutor asked the jury to reject heat of passion, self-defense and imperfect self-defense. He asserted appellant was guilty of possessing a firearm as a convicted felon.

The prosecutor urged the jury to find appellant guilty of first degree murder.

Following defense counsel's closing arguments, the prosecutor noted both experts had agreed appellant suffered from mental illness. The prosecutor contended both experts agreed appellant could engage in goal oriented behavior. The prosecutor said "this notion of [appellant] having a mental defect that put him so far out of his mind, and that he didn't know what he was doing, and he couldn't perform the intent to kill is kind of nonsense." A defense objection to the term "nonsense" was overruled.

Shortly thereafter, the prosecutor said "it's nonsense that [appellant] didn't know what he was doing. It's just -- it's kind of a whacked out argument if you ask me." After a defense objection, the trial court directed the prosecutor to not refer to defense counsel as "wacked out." The prosecutor later said "this notion that [appellant] was so far out of his mind that he didn't know what he was doing is not supported by the evidence …."

B. Standard of review.

"A trial court's decision to admit or exclude expert testimony is reviewed for abuse of discretion. [Citation.]" (*People v. Pearson* (2013) 56 Cal.4th 393, 443.) Under that standard, we will not disturb the trial court's decision unless it was arbitrary, capricious, or patently absurd resulting in a manifest miscarriage of justice. (*People v. Rodriguez* (1999) 20 Cal.4th 1, 9–10.)

C. Analysis.

Appellant argues the trial court erred when it limited Longwidth's testimony. He contends he was denied a fundamental right to present a defense. In contrast, respondent asserts appellant failed to preserve this issue for appeal because he did not object to the trial court's ruling on the ground it deprived him of his right to present a defense. Respondent also maintains the trial court's ruling was correct and, in any event, appellant was able to present a full defense.

As an initial matter, we need not resolve the parties' dispute regarding whether or not appellant failed to preserve this issue for appeal. When we presume this issue was preserved, appellant's claim fails on its merits.

"In the guilt phase of a criminal action, any expert testifying about a defendant's mental illness, mental disorder, or mental defect shall not testify as to whether the defendant had or did not have the required mental states, which include, but are not limited to, purpose, intent, knowledge, or malice aforethought, for the crimes charged. The question as to whether the defendant had or did not have the required mental states shall be decided by the trier of fact." (§ 29.) "Section 29 prohibits expert witnesses from directly stating their conclusions regarding whether a defendant possessed a required mental state." (*People v. Pearson, supra,* 56 Cal.4th at p. 443.) Pursuant to section 29, "neither side may elicit from an expert that a defendant acted with, or lacked, a particular mental state. [Citation.]" (*People v. Halvorsen* (2007) 42 Cal.4th 379, 408.)

Here, under the doctrine of imperfect self-defense, the jury had to determine whether appellant harbored a belief that immediate use of deadly force was necessary to defend against a perceived danger. Based on a hypothetical person with appellant's disorders, mental injury and drug use, Longwidth originally opined appellant would believe he had to kill someone to eliminate a perceived threat. Longwidth's opinion conflicted with section 29 as it represented testimony regarding appellant's intent and mental state. This was an issue for the jury to decide.

Appellant, however, contends this testimony was elicited through a hypothetical question and "Longwidth had not slipped out of the hypothetical." We disagree. Although a hypothetical question was posed, Longwidth interjected that "[i]n this case" appellant "believed that someone was trying to kill him." Longwidth then opined that "in his belief system in order to eliminate that threat, he has to kill them." Such testimony reflected Longwidth's opinion regarding appellant's mental state.

Moreover, a hypothetical question may not be used to ask indirectly what is directly impermissible under section 29. (*People v. Bordelon* (2008) 162 Cal.App.4th 1311, 1327.) A hypothetical question may not seek an opinion from an expert regarding a defendant's specific intent. Permitting an expert's hypothetical response regarding a defendant's circumstances is the functional equivalent of asking an expert whether the defendant had that intent. (*Ibid.*)

Based on this record, we do not find an abuse of discretion when the trial court sustained the prosecutor's objection and struck Longwidth's testimony. The trial court's decision was not arbitrary, capricious or patently absurd. Accordingly, this claim fails.

III. There Is Insufficient Evidence To Sustain The Gang Enhancements.

Appellant asserts the record contains insufficient evidence to sustain the gang enhancements to counts 1, 2 and 3. He maintains he acted alone and there is no evidence establishing his intent to benefit, promote, further, or assist the gang. He relies primarily on *People v. Albillar* (2010) 51 Cal.4th 47 (*Albillar*) and *In re Frank S.* (2006) 141 Cal.App.4th 1192 (*Frank*).

Respondent contends appellant was recruited into the gang by Lil No Brains, they had a falling out and appellant became suspicious. Appellant could not appear to be soft. He used a stolen firearm in these shootings, which was consistent with the gang's primary activities. The resolution of this "inter-gang conflict in a public place" enhanced appellant's status in the gang, and increased the gang's status in the community. Respondent cites *Albillar, supra*, 51 Cal.4th 47, and argues substantial evidence supports the gang enhancements.

We find appellant's contentions persuasive. A gang enhancement requires the prosecution to prove that the underlying crime was "committed for the benefit of, at the direction of, or in association with any criminal street gang, with the specific intent to promote, further, or assist in any criminal conduct by gang members …." (§ 186.22,

subd. (b)(1).) These requirements have been called the "gang-related" and "specific intent" prongs. (*People v. Rios* (2013) 222 Cal.App.4th 542, 564.)

Three cases, *Frank, supra,* 141 Cal.App.4th 1192; *People v. Ramon* (2009) 175 Cal.App.4th 843 (*Ramon*); and *In re Daniel C.* (2011) 195 Cal.App.4th 1350 (*Daniel*), are instructive regarding insufficient evidence to establish a specific intent to promote, further, or assist in criminal conduct by gang members.

In *Frank,* police stopped a minor after he ran a red light on his bicycle. The minor was alone. He gave a false name, and the officer located a concealed knife, a red bandana and methamphetamine in his possession. (*Frank, supra,* 141 Cal.App.4th at p. 1195.) The minor said he had been attacked two days before and "needed the knife for protection against 'the Southerners' because they feel he supports northern street gangs." (*Ibid.*) The minor said he had friends in the northern gangs and listed himself as a Norteño affiliate during intake at the juvenile detention facility. (*Ibid.*) A gang expert opined that, based on this evidence, the minor was an active Norteño and his possession of the knife benefitted the Norteños because "it helps provide them protection should they be assaulted." (*Id.* at pp. 1195–1196.) The juvenile court found true a gang enhancement. (*Id.* at p. 1196.)

The appellate court, however, reversed the gang enhancement imposed pursuant to section 186.22, subdivision (b)(1). (*Frank, supra,* 141 Cal.App.4th at p. 1199.) *Frank* determined the expert simply stated her belief regarding the minor's intent with possession of the knife, which was an issue reserved to the trier of fact. (*Ibid.*) Other than the expert's opinion testimony, no other evidence was introduced to establish "that possession of the weapon was 'committed for the benefit of, at the direction of, or in association with any criminal street gang ….' (§ 186.22, subd. (b)(1).) The prosecution did not present any evidence that the minor was in gang territory, had gang members with him, or had any reason to expect to use the knife in a gang-related offense. In fact, the only other evidence was the minor's statement to the arresting officer that he had been

jumped two days prior and needed the knife for protection. To allow the expert to state the minor's specific intent for the knife without any other substantial evidence opens the door for prosecutors to enhance many felonies as gang-related and extends the purpose of the statute beyond what the Legislature intended." (*Frank, supra,* 141 Cal.App.4th at p. 1199.) *Frank* noted that evidence of the minor's affiliation with Norteños did "not prove a specific intent to use the knife to promote, further, or assist in criminal conduct by gang members. [Citation.]" (*Ibid*.)

In *Ramon, supra,* 175 Cal.App.4th 843, this court vacated a gang enhancement due to insufficient evidence. (*Id.* at p. 846.) The defendant, a gang member, was stopped by a sheriff's deputy while driving a stolen vehicle and with an unregistered firearm in his possession. Another male was present with the defendant. The stop occurred "in the heart" of the defendant's gang territory. The prosecution's gang expert opined at trial that driving a stolen vehicle and possessing an unregistered firearm provided a benefit to the defendant's gang because both could be used to conduct numerous crimes. The unregistered firearm and stolen vehicle could also be used to spread fear and intimidation. (*Id.* at pp. 847–848.)

The *Ramon* court stated the prosecution's "expert simply informed the jury of how he felt the case should be resolved. This was an improper opinion and could not provide substantial evidence to support the jury's finding." (*Ramon, supra,* 175 Cal.App.4th at p. 851.) The facts did not show whether the defendant was acting on his own behalf or on the gang's behalf. Although it was possible the defendant and his companion were acting to benefit the gang, "a mere possibility is nothing more than speculation. Speculation is not substantial evidence. [Citation.]" (*Ibid.*) The defendant's presence with another gang member in gang territory was not adequate to establish the defendant's specific intent to promote, further or assist criminal conduct by gang members. Nothing in the record permitted the prosecution's expert to reach such a conclusion. (*Ibid.*) Although the expert gave a possible motive or reason for the defendant's actions, it was

not the only possibility and did not prove this fact beyond a reasonable doubt. (*Id.* at p. 853.) *Ramon* held an expert's testimony, by itself, was not sufficient to support a section 186.22, subdivision (b)(1), enhancement. (*Ramon,* at p. 853.)

In *Daniel, supra,* 195 Cal.App.4th 1350, a minor was declared a ward of the juvenile court after committing a robbery with a deadly weapon and inflicting great bodily injury on a victim. The juvenile court found true a gang enhancement. The minor had entered a supermarket with two other young men, who left separately while the minor remained behind. The minor picked up a large bottle of liquor and walked towards the exit, whereupon an employee confronted him. The minor raised the bottle as if to strike the employee or throw it, but the bottle broke on a nearby machine. The minor struck the employee on the ear with the neck of the bottle and he fled from the store. (*Daniel, supra,* 195 Cal.App.4th at p. 1353.) The minor fled in a truck with three other young men. Police located the truck with the minor and his three companions. All four were wearing clothing containing red. (*Id.* at p. 1354.) The minor admitted going to the store to get alcohol but said his friends did not know he intended to steal it. One of his companions admitted they went to the store to obtain alcohol. (*Ibid*.) The minor was a Norteño gang affiliate, one of his friends was a gang member, and another was a gang associate. (*Id*. at pp. 1357–1358.)

The appellate court determined there was insufficient evidence to support the gang enhancement. (*Daniel, supra,* 195 Cal.App.4th at p. 1364.) The *Daniel* court rejected the testimony from the prosecution's expert witness, who had opined the minor committed the robbery to further the interests of the Norteño gang. However, nothing indicated the minor or his companions did anything while in the supermarket to identify themselves with any gang, other than wearing clothing with red. No gang signs or words were used, and none of the witnesses to the crime knew that gang members or affiliates were involved. "Therefore, the crime could not have enhanced respect for the gang members or intimidated others in their community, as suggested by [the prosecution's

expert]." (*Id.* at p. 1363.) There was also no evidence the minor or his companions entered the store with the intention of committing a violent crime. Without intervention from the store's employee, it appears the minor would have simply walked out with the liquor. Thus, *Daniel* determined the underlying premise of the expert's opinion was factually incorrect that the participants planned or executed a violent crime in concert to instill fear or enhance their respect in the community. (*Id.* at pp. 1363–1364.)

The *Daniel* court also rejected the expert's opinion testimony that, even if the minor had successfully shoplifted the liquor, the minor would have still benefited the gang because he was willing to commit the crime for other gang members. (*Daniel, supra,* 195 Cal.App.4th at p. 1364.) *Daniel* questioned how the expert's opinion "in this regard drew any distinction between crimes in general and crimes carried out with the specific intent to promote, further, or assist gang activity." (*Ibid.*) *Daniel* held that "such general opinion testimony as to intent" expanded "the gang enhancement statute to cover virtually *any* crime committed by someone while in the company of gang affiliates, no matter how minor the crime, and no matter how tenuous its connection with gang members or core gang activities." (*Ibid.*, original italics.) The appellate court noted that, if allowed, section 186.22, subdivision (b)(1), would be impermissibly converted into a general intent crime. (*Daniel*, at p. 1364.) *Daniel* found that the expert's opinion testimony was not substantial evidence to support a finding of proof beyond a reasonable doubt that the minor committed the robbery with the specific intent to promote, further, or assist criminal activity by gang members. (*Ibid*.)

Here, as in *Frank* and *Ramon*, the prosecution's expert simply stated one possible reason why appellant committed this shooting and possessed the firearm. Although it was possible appellant acted to benefit the gang, "a mere possibility is nothing more than speculation. Speculation is not substantial evidence. [Citation.]" (*Ramon, supra,* 175 Cal.App.4th at p. 851.) Other than the expert's opinion testimony, no other evidence established appellant's specific intent to promote, further or assist in criminal conduct by

gang members. Appellant's gang membership is insufficient to establish such specific intent. (*Frank, supra,* 141 Cal.App.4th at p. 1199.)

Similar to *Daniel*, appellant did not make any gang signs or state any gang slurs when he shot the victims. There is no evidence appellant was instructed or encouraged to shoot Taylor and Alexander. There is no evidence this shooting was part of another crime committed to benefit the gang. We question the gang expert's opinion that appellant acted to benefit the gang because shooting these victims would allegedly increase the gang's reputation and would enhance appellant's status. The expert's opinion draws no distinction between crimes in general and crimes carried out with a specific intent to promote, further or assist gang activity. (*Daniel, supra,* 195 Cal.App.4th at p. 1364.) *Frank*, *Ramon*, and *Daniel* dictate that we vacate the gang enhancements.

Albillar, supra, 51 Cal.4th 47, does not alter our conclusion. In *Albillar*, the defendants were two brothers and their cousin, who were members of the same gang. They were involved in the rape of a 15-year-old girl. A jury found true that the sex offenses were committed in violation of section 186.22, subdivision (b). (*Albillar*, at pp. 50–53.) Our Supreme Court granted review, in part, to examine whether substantial evidence supported the gang enhancements. (*Id.* at p. 54.) *Albillar* noted that a criminal offense is subject to the gang enhancement " 'only if the crime is "gang related." ' [Citation.] Not every crime committed by gang members is related to a gang." (*Id.* at p. 60.) *Albillar* stated that section 186.22, subdivision (b)(1), "does not pose a risk of conviction for mere nominal or passive involvement with a gang. Indeed, it does not depend on membership in a gang at all. Rather, it applies when a defendant has personally committed a gang-related felony with the specific intent to aid members of that gang." (*Albillar*, at pp. 67–68.) "In sum, if substantial evidence establishes that the defendant intended to and did commit the charged felony with known members of a gang, the jury may fairly infer that the defendant had the specific intent to promote,

further, or assist criminal conduct by those gang members." (*Id.* at p. 68.) Based on its record, *Albillar* held that substantial evidence existed to support the gang enhancements because the defendants acted together to rape the victim. (*Ibid.*)

Here, unlike in *Albillar*, appellant confronted Taylor and Alexander by himself. There is no evidence appellant acted in concert with anyone, let alone members of his own gang. The evidence tends to show appellant possessed the gun and shot the victims to further his own interests. *Albillar* is factually distinguishable.

Escobedo's opinion testimony standing alone is not substantial evidence to support a finding of proof beyond a reasonable doubt that appellant committed these shootings, or possessed the firearm, with the specific intent to promote, further or assist criminal activity by gang members. Accordingly, the jury's true findings are vacated regarding the gang enhancements in counts 1, 2 and 3.[3]

IV. Escobedo's Testimony Was Not Prejudicial Regarding Counts 1 And 2.

Appellant contends the trial court abused its discretion by permitting Escobedo to testify these shootings were gang related. He argues it is unlikely he would have been convicted of premeditated murder or attempted premeditated murder without the gang expert's testimony that these shootings were motivated to benefit the gang. He asserts counts 1 and 2, as well as the gang enhancements, must be reversed.

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3 At sentencing, the trial court did not impose an enhancement pursuant to section 186.22, subdivision (b)(1), on the sentences in counts 1 and 2. The court orally imposed an enhancement of four years to appellant's sentence in count 3 pursuant to section 186.22, subdivision (b)(1). The court stayed the sentence on count 3, including the enhancement, pursuant to section 654. The indeterminate abstract of judgment correctly shows that the sentence on count 3 was stayed, but it fails to show an enhancement imposed pursuant to section 186.22, subdivision (b)(1). In light of this opinion, no further action is required regarding the indeterminate abstract of judgment because it fails to show an imposed gang enhancement.

A. Background.

After the preliminary hearing, both parties filed certain motions in limine. The prosecution sought admission of its gang expert's testimony to establish motive and intent, and to prove the elements regarding the gang enhancements. The defense requested to bifurcate the gang allegations, and requested an evidentiary hearing to determine the admissibility of the prosecution's expert testimony.

At the hearing regarding the motions in limine, the trial court inquired about Escobedo's anticipated opinion testimony. Escobedo was present in court, and the judge asked him directly about his theories. Escobedo, without being placed under oath, responded that his opinions "will be a little more cleaned up for trial." However, he believed an internal feud occurred between gang members. Escobedo believed appellant's actions elevated or maintained his status within the gang, while his inaction would have caused him to lose respect. The judge stated Escobedo was "very clear and succinct" regarding his proposed opinion testimony. The judge informed defense counsel that Escobedo's opinion testimony could be revisited at trial if the evidence did not support it.

B. Standard of review.

An appellate court reviews for abuse of discretion a trial court's ruling excluding or admitting expert testimony. (*Sargon Enterprises, Inc. v. University of Southern California* (2012) 55 Cal.4th 747, 773.) "A ruling that constitutes an abuse of discretion has been described as one that is 'so irrational or arbitrary that no reasonable person could agree with it.' [Citation.]" (*Id.* at p. 773.) The erroneous admission of evidence will not result in a reversal of judgment unless the reviewing court believes the error resulted in a miscarriage of justice. (Evid. Code, § 353, subd. (b).) "[A] 'miscarriage of justice' should be declared only when the court, 'after an examination of the entire cause, including the evidence,' is of the 'opinion' that it is reasonably probable that a result

more favorable to the appealing party would have been reached in the absence of the error." (*People v. Watson* (1956) 46 Cal.2d 818, 836.)

C. Analysis.

The parties dispute whether appellant forfeited this issue on appeal and whether the trial court abused its discretion in permitting Escobedo's opinion testimony at trial. We need not, however, resolve these disputes. In light of our conclusion in section III above, appellant's contentions are now moot regarding the gang enhancements in counts 1, 2 and 3 as those true findings are now vacated. Regarding the convictions for premeditated murder and premeditated attempted murder, Escobedo's opinion testimony was harmless.

As we analyzed in section I, overwhelming evidence establishes premeditation and deliberation. The victims walked out of Taylor's residence and appellant confronted them while carrying a loaded gun. Appellant opened fire when the victims ignored him and walked away. After initially firing at the victims, appellant walked towards them and fired more shots while pointing his gun downward at them. He fired a total of nine times, emptying his clip.

Based on a review of the entire cause, a miscarriage of justice did not occur. Escobedo's testimony was not essential to the murder and attempted murder convictions. It is not reasonably probable a result more favorable to appellant would have occurred regarding counts 1 and 2 had the trial court precluded Escobedo's opinion testimony. Accordingly, this claim fails.

V. The Prosecutor Did Not Commit Misconduct And Any Presumed Misconduct Was Harmless.

Appellant asserts prosecutorial misconduct occurred during closing arguments. He contends he was denied a fair trial and his conviction must be reversed.

A. Background.

1. Closing arguments.

In arguments to the jury, the prosecutor made the following relevant comments:

> "[PROSECUTOR]: Now, if you decide that the killing of Otis Taylor was first degree murder, you would be essentially finding that it was premeditated and deliberate. According to jury instruction, I believe, it's 601, the amount of time required for deliberate and premeditation may vary from person to person and according to the circumstances. Willfully, just basically means it was intentional, and it wasn't an accidental killing. A deliberate [*sic*] needs a balancing test. I know it's bad, but can I get away with it? And premeditation is basically thinking about it before you actually do the killing.
>
> "An example of premeditation and deliberation is when a driver is coming up on like a still green light at an intersection. And as he is approaching that light, it turns yellow. And, at that point, that driver has to decide whether he's going to put on the brakes or if he's trying to give it some gas and make the light, and he also has to consider that if he gives it some gas, is he going to get a ticket, or worse, is he going to get into a wreck? That is an example of how much time it takes.
>
> "[DEFENSE COUNSEL]: Judge, I'm going to object. That misstates the law really.
>
> "THE COURT: No, I think as to -- we're not talking about reasonable doubt here. I [think] that can be an issue. We're talking about premeditation and deliberation. I will overrule the objection."

2. Relevant jury instructions.

With CALCRIM No. 200, the jury was instructed to follow the law as explained to them by the judge. "If you believe that the attorneys' comments on the law conflict with my instructions, you must follow my instructions."

With CALCRIM No. 521, the jury was instructed regarding deliberation and premeditation in relevant part as follows:

> "THE COURT: [Appellant] is guilty of first degree murder if the People have proved that he acted willfully, deliberately, and with premeditation. [Appellant] acted willfully if he intended to kill, and

> [appellant] acted deliberately if he carefully weighed the consideration against his choice and knowing the consequences decided to kill. [Appellant] acted with premeditation if he decided to kill before completing the act that caused death. The length of time the person spends considering whether to kill does not alone determine whether the killing is deliberate and premeditated.
>
> "The amount of time required for deliberation may vary from person to person and according to the circumstances. A decision to kill made rationally [*sic*], impulsively or without careful consideration and [*sic*] is not deliberate and premeditated.
>
> "On the other hand, a cold calculated decision to kill can be reached quickly. The test is the extent of the reflection, not the length of the time."

B. Standard of review.

The Fourteenth Amendment to the United States Constitution is violated when a prosecutor's misconduct infects the trial with such unfairness as to deny due process. (*People v. Tully* (2012) 54 Cal.4th 952, 1009.) The misconduct must be significant enough to deny a fair trial. (*Ibid.*) Even if the prosecutor's misconduct does not result in a fundamentally unfair trial, California law is violated if the prosecutor used deceptive or reprehensible methods in attempting to persuade the jury or the court. (*Id.* at pp. 1009–1010.) Prosecutorial misconduct, however, will not result in reversal of a defendant's conviction unless it is reasonably probable the defendant would have obtained a result more favorable without the misconduct. (*Id.* at p. 1010.)

C. Analysis.

The parties dispute whether the prosecutor's analogy misstated the law or not. Appellant asserts the prosecutor's argument was misleading and allowed the jury to find premeditation "even though there was no true weighing of the pros and cons." He argues a driver instinctively and "unreflectively" acts based on the needs of safety and past experience. He contends that the trial court implicitly endorsed the prosecutor's arguments, which he asserts "virtually eliminated" his "mental state" defense. He maintains the defense presented "substantial evidence" that he did not premeditate and

deliberate, requiring reversal because he was prejudiced. We disagree. Misconduct did not occur and any presumed misconduct was not prejudicial.

1. The prosecutor did not misstate the law.

In general, a prosecutor may not misstate the law; in particular, a prosecutor may not "attempt to absolve the prosecution from its prima facie obligation to overcome reasonable doubt on all elements. [Citations.]" (*People v. Hill* (1998) 17 Cal.4th 800, 829.)

As discussed in section I, premeditation and deliberation exist when a killing or attempted killing occurred as a result of preexisting reflection rather than an unconsidered or rash impulse. (*People v. Bolin, supra,* 18 Cal.4th at p. 332.) In the context of first degree murder, " 'premeditated' means 'considered beforehand,' and 'deliberate' means 'formed or arrived at or determined upon as a result of careful thought and weighing of considerations for and against the proposed course of action.' [Citations.]" (*People v. Mayfield, supra,* 14 Cal.4th at p. 767.)

Here, the prosecutor said deliberation was "a balancing test. I know it's bad, but can I get away with it?" Regarding premeditation, he described it as "basically thinking about it before you actually do the killing." The prosecutor's analogy regarding a driver attempted to show the time it might take for a person to weigh the consequences for and against a proposed course of action. We cannot say the prosecutor's analogy misstated the law or created a fundamentally unfair trial. The prosecutor's comments reflected the Supreme Court's definition of premeditation and deliberation. The prosecutor's comments did not attempt to absolve the prosecution of its prima facie obligation to overcome reasonable doubt on all elements. The prosecutor did not use deceptive or reprehensible methods to persuade the jury. Misconduct is not present.

2. Any presumed misconduct was not prejudicial.

Even if we presume misconduct occurred, the prosecutor's brief analogy was not prejudicial. The court instructed the jury on the definitions of premeditation and

deliberation. The jury was told to follow the court's instructions if the attorneys' comments on the law were in conflict. It is presumed that the jurors followed the court's instructions. (*People v. Letner and Tobin* (2010) 50 Cal.4th 99, 152.) Given the state of this record, it is not reasonably probable appellant would have obtained a result more favorable in the absence of these comments. Accordingly, this claim fails.

VI. Sentencing Error Occurred Regarding The Companion Cases.

Both parties contend sentencing error occurred. Appellant asserts the two felony sentences imposed in the Companion Cases violated section 1170.1, subdivision (a), because the second determinate sentence was not reduced. Respondent disputes that contention but argues this case should be remanded because the trial court failed to impose the gang enhancements in counts 1 and 2. Appellant objects to respondent's request.

A. Background.

In the present matter, appellant was sentenced to an indeterminate term of 25 years to life for Taylor's premeditated murder (§ 187, subd. (a); count 1), and a consecutive term of life with the possibility of parole after 15 years for Alexander's attempted murder (§§ 664/187, subd. (a); count 2). Both counts were separately enhanced by consecutive 25-year terms for the firearm (§ 12022.53, subd. (d)). For possession of a firearm, appellant was sentenced to three years (§ 29800, subd. (a)(1); count 3), which was increased by four years for the gang enhancement (§ 186.22, subd. (b)(1)). The sentence for count 3 was stayed pursuant to section 654. Total custody credits of 578 days were awarded.

In case number BF127849A, appellant was sentenced to prison for 16 months (Health & Saf. Code, § 11378). He was awarded total custody credits of 1,802 days. The court said this "sentence will be deemed served."

In case number BF136825B, appellant was sentenced to prison for two years (former § 12021, subd. (a)(1)). He was awarded total custody credits of 1,434 days. The

court said this "sentence will be deemed served." When imposing sentence in the Companion Cases, the trial court did not indicate whether appellant was to serve concurrent or consecutive felony sentences.

B. Analysis.

As an initial matter, we reject respondent's argument that remand is necessary to impose sentence on the gang enhancements in counts 1 and 2. As we analyzed in section III, the jury's true findings are vacated regarding the gang enhancements in counts 1, 2 and 3.

In addition to his principal argument, which we discuss below, appellant contends his net sentence in the Companion Cases is four years in state prison. He further asserts he only had credit for 578 days in custody so his sentences in the Companion Cases cannot be deemed served. He argues nothing in the abstract of judgment memorializes that these sentences have been served. He maintains he will have to complete the two determinate sentences from the Companion Cases before he begins the aggregated indeterminate sentence. The record does not support these contentions.

The abstracts of judgment for the determinate and indeterminate sentences both correctly list total custody credits of 3,814 days for the three cases combined. This total reflects total custody credits of 3,236 days for the Companion Cases. Contrary to appellant's argument, the net sentence for the Companion Cases is not four years, but three years four months, which is correctly reflected on the determinate abstract of judgment. Given appellant's total custody credits, the determinate abstract of judgment reflects that the sentences for the Companion Cases have been served.

However, we agree with appellant's principal argument that sentencing error occurred regarding application of section 1170.1. Section 1170.1, subdivision (a), controls the calculation and imposition of a determinate sentence when a defendant has been convicted of more than one felony. (*People v. Beard* (2012) 207 Cal.App.4th 936, 940.) Under section 1170.1, when a person is convicted of two or more felonies and

consecutive sentences are imposed, the total sentence consists of "the principal term, the subordinate term, and any additional term imposed for applicable enhancements for prior convictions, prior prison terms, and Section 12022.1." (§ 1170.1, subd. (a).) The principal term consists of the greatest term of imprisonment imposed plus any applicable specific enhancements. The "subordinate term" for each consecutive felony conviction consists of one-third of the middle term of imprisonment prescribed for the subordinate offense plus one-third of the term imposed for any applicable specific enhancements. (*Ibid.*) A trial court is required to determine whether a sentence shall be consecutive or concurrent. (§ 669, subd. (a).)

Here, appellant was sentenced on two felonies in the Companion Cases. The trial court, however, never stated, as required, whether these sentences were consecutive or concurrent. The determinate abstract of judgment is also silent regarding this issue, but it appears consecutive sentences were imposed. An imposition of consecutive sentences for the two felony convictions would have triggered section 1170.1, requiring imposition of one-third of the middle term for the subordinate offense.

Respondent contends section 1170.1, subdivision (a), applies only to sentences "that are yet to be served" and not to sentences which are complete. Respondent argues "there would be no point in recalculating a sentence pursuant to section 1170.1 subdivision (a) that had already been served." We disagree with respondent's position.

When a person, such as appellant, has been committed to prison on a life sentence which is to run consecutively to a determinate term of imprisonment, the determinate term of imprisonment is to be served first. No part of the determinate term may be credited toward the person's eligibility for parole. (§ 669, subd. (a).)

Here, reduction of appellant's determinate sentence will impact when he can start his indeterminate sentence, which will impact his eligibility for parole. Accordingly, we reject respondent's contention that resentencing has "no point" or that a remand is unnecessary.

We remand this matter for the trial court to declare as required whether the sentences in the Companion Cases were to be served concurrently or consecutively. If a consecutive sentence is imposed, the trial court shall resentence appellant pursuant to the requirements of section 1170.1. The court shall then prepare an amended abstract of judgment for the determinate prison commitment.

DISPOSITION

In case number BF146307A, the enhancements are vacated in counts 1, 2 and 3 based on the jury's finding that appellant violated Penal Code section 186.22, subdivision (b)(1). The sentences are vacated in case numbers BF127849A and BF136825B. The matter is remanded to the trial court for resentencing. At resentencing, the trial court shall articulate whether the felony sentences in BF127849A and BF136825B are concurrent or consecutive. If a consecutive sentence is imposed, the trial court shall declare the subordinate term and resentence in conformity with Penal Code section 1170.1. The trial court shall then forward an amended determinate abstract of judgment to the appropriate authorities. The judgment is otherwise affirmed.

_____
LEVY, Acting P.J.

WE CONCUR:

_____
GOMES, J.

_____
SMITH, J.